IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75 - 1397

JOSEPH JUIDICE, Individually and in his capacity as a Judge of the Dutchess County Court, RAYMOND E. ALDRICH, JR., individually and in his capacity as a Judge of the Dutchess County Court,

Appellants,

-against-

HARRY VAIL, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

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Appellees, pursuant to Rule 16(1)(c) and 16(1)(d) of the Rules of the Supreme Court of the United States, move to affirm the judgment of the District Court on the grounds that: (1) the questions presented are so unsubstantial as not to need further argument; and

(2) the decision of the District Court is plainly correct.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

STATUTES CITED

Federal

State

OTHER AUTHORITIES CITED

STATEMENT OF THE CASE

This is a direct appeal from the judgment entered on January 28, 1976, by a district court of three judges specially constituted pursuant to 28 U.S.C. §2281 and §2284. The district court granted partial summary judgment to appellees, declared that Sections 756, 757, 770, 772, 773, 774, and 775 of the Judiciary Law of the State of New York were unconstitutional on their face, and enjoined the operation of said statutes against appellees and members of their class.

Each of the named appellees were indigent debtors who were imprisoned or threatened with incarceration pursuant to New York Judiciary Laws because of their noncompliance with a post-judgment discovery subpoena and their inability to pay a contempt fine. Each appellee initially had a default money judgment taken against him or her [1] by a judgment creditor. In an effort to enforce the judgment, the judgment creditors issued subpoenas to compel the disclosure of assets pursuant to New York Civil Procedure Law and Rules 5223. The subpoenas required appellees to appear before a notary public for the taking of a desposition regarding all matters relevant to the satisfaction of the judgment and to produce certain books and records for examination. When appellees failed to comply with the judgment creditor's subpoena, the judgment creditor instituted civil contempt proceedings against appellees pursuant to New York Civil Procedure Law and Rules 5251 and New York Judiciary Law Section 753(2)(5).

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[1] Appellee Rabasco is the only exception to this pattern. Because of his indigency, he was unable to comply with a court order of support issued by appellant Grady, and the civil contempt process was instituted by his wife to enforce the support order.

The creditors instituted the civil contempt proceedings by the issuance of a show cause order by appellants Aldrich or Juidice pursuant to New York Judiciary Law Section 757(1) requiring the appellees to demonstrate why he or she should not be adjudged in contempt of court for failure to obey the creditor's subpoena. Judiciary Law Section 757(1) provides that the court shall "Make an order, requiring the accused to show cause before it, or him, at a time and place therein specified, why the accused should not be punished for the alleged offense. . .". Judiciary Law Section 757(1) does not require that the notice inform individuals that failure to appear may result in contempt of court, a fine paid to the creditors that may exceed the underlying debt, and imprisonment. The appellants Aldrich and Juidice issued the show cause order based upon the affidavit of service of the subpoena and the affirmation of the creditor's attorney indicating that the appellee did not appear in compliance with the subpoena.

In each case when appellees failed to appear,[2] they were adjudged in contempt of court by appellants Aldrich or Juidice[3] pursuant to Judiciary Law Sections 770 and 772, and were ordered to pay a fine of up to $250 plus court costs within a specified period of time or face incarceration until the fine was paid. Judiciary Law §773 provides that a fine of up to $250

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[2] Failure to appear may be caused by many factors. A 1973 study of the New York Civil Contempt procedures revealed that more than one-half of the individuals failed to appear at the show cause hearing because they did not understand the meaning of the show cause order. The study indicated that "Few if any of the persons interviewed understood why they had been fined, and none stated they knew how to prevent it." Alderman, Imprisonment for Debt: Default Judgments, the Contempt Power and the Effectiveness of Notice Provisions in the State of New York, 24 Syracuse Law Review 1217, 1239 (1973).

[3] Appellee Rabasco was the only person to appear at the show cause hearing. At that time, he requested that appellant Grady assign an attorney to represent him as he did not have sufficient funds to retain a lawyer. This request was denied as the Judiciary Law makes no provision for the assignment of counsel. Appellants' (continued)

plus costs may be imposed with no proof of loss or injury and that the fine is to be paid to the judgment creditor.[4] Pursuant to Judiciary Law Sections 770 and 772, appellees were adjudged in contempt of court and subjected to the threat of incarceration without an actual hearing and without being advised of their right to counsel and to assigned counsel if indigent. This order of contempt was the first notice appellees received regarding the possibility of incarceration. All appellees failed to pay the fine due to their indigence.

When appellees failed to pay the fine within the specified period of time, appellants Aldrich or Juidice issued an ex parte commitment order pursuant to Judiciary Law §756. The court issued this order based upon an affidavit of the creditor's attorney stating that the appellee had not paid the full amount of the fine and an affidavit of a process server stating that appellee had been served with the contempt order. Pursuant to Judiciary Law §756 entitled "Issue of warrant without notice", appellees were incarcerated or threatened with incarceration without an actual hearing and without being advised of their right to counsel and to assigned counsel if indigent.

Pursuant to Judiciary Law §774, appellees were incarcerated until they paid the contempt fine plus costs and sheriff

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[3] (cont.) argument that appellee Rabasco retained Mid-Hudson Valley Legal Services Project is spurious. Mid-Hudson Valley Legal Services Project was retained to assist him in receiving assigned counsel and not to defend the contempt proceeding.

[4] Thus while the underlying judgment in appellee Ward's case was $146.84, he was fined $250 plus $20 for costs and expenses. The judgment creditor is entitled to keep the entire $250 pursuant to Judiciary Law §773.

fees. Judiciary Law §774 provides for incarceration with no inquiry into the ability of the contemnor to pay the fine. Judiciary Law §774 provides for incarceration for a period of up to ninety days before a court reviews the proceedings.

On October 30, 1974, appellees Vail, Ward, and McNair filed a complaint seeking to have the court declare invalid and enjoin the enforcement of Judiciary Law Sections 756, 757, 765, 767, 769, 770, 771, 772, 773, 774, and 775 on the grounds that appellants' use and enforcement of the statutes violated appellees' rights under the Fourth, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution. Appellee Ward sought a temporary restraining order and preliminary injunction against the enforcement of the above mentioned sections of the Judiciary Law. On November 6, 1974 a temporary restraining order was issued restraining appellants from arresting and imprisoning appellee Ward. Appellees Hurry, Nameth, Humes, Harvard, Rabasco, Russell, Thorpe, and Harrell were subsequently intervened. Temporary restraining orders were subsequently issued on January 2, 1975 restraining appellants from arresting or imprisoning appellee Hurry, and on January 28, 1975 restraining appellants from arresting or imprisoning appellees Nameth, Humes, Harvard, and Rabasco.

On January 28, 1976, a three judge district court declared invalid and enjoined the enforcement of Sections 756, 757, 770, 772, 773, 774 and 775 of the Judiciary Law of the State of New York on the following grounds:

(1) Sections 756, 757, 770, 773, and 774 permit an adjudication of contempt and order of imprisonment without an actual hearing;

(2) Section 757 does not provide for adequate notice or warning of the consequences of failure to appear at the show cause hearing;

(3) Sections 756, 770, 772, and 774 subject the debtor to imprisonment without informing him of his right to counsel and to assigned counsel if indigent, and

(4) the fines and incarceration permitted under Sections 756, 770, 773, and 774 are punitive.

The court also denied appellants' motion for a stay. On February 12, 1976, Justice Thurgood Marshall granted appellants' application for a stay of judgment. On March 1, 1976, Justice Marshall denied appellees' application for modification of the stay.

I. ARGUMENT

THE THREE JUDGE COURT CORRECTLY DECIDED NOT TO ABSTAIN FROM DECIDING THE ISSUES RAISED IN THIS ACTION.

A. Introduction

28 U.S.C. §2283 permits federal courts to enjoin state court proceedings if the injunction is "expressly authorized by an Act of Congress." Actions under 42 U.S.C. §1983 fall within the expressly authorized section of 28 U.S.C. §2283. Mitchum v. Foster, 407 U.S. 225, 243 (1972). In Mitchum, supra, this court noted at 242 that

> "The very purpose of §1983 was to interpose the federal courts between the states and the people, as guardians of the people's federal rights - to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial. . .' ".

The three judge court properly held that the abstention doctrines in Younger v. Harris, 401 U.S. 37 (1971) and Huffman v. Pursue, Ltd., 420 U.S. 592, 95 S. Ct. 1200 (1975) did not apply to civil contempt proceedings because (1) the civil contempt statutes are unrelated to criminal statutes and do not play any part in the enforcement of state criminal laws, and (2) the deficiencies in the civil contempt procedures prevent individuals from having an adequate opportunity to raise the federal issues in state court.

B. Huffman v. Pursue Ltd., supra, Does Not Mandate Abstention Because the New York Civil Contempt Statutes are Civil Proceedings.

Appellees contend that principles of equity, comity, and federalism permit an injunction of the [illegible] court civil proceedings in the instant action. Huffman, supra, presents no bar to an injunction of the state court proceedings in this case. In Huffman, supra, the Supreme Court reiterated the philosophy expressed in Younger v. Harris, 401 U.S. 42, 43 (1971) that ". . . courts of equity should not set . . . to restrain a criminal prosecution." This court in Huffman, supra, noted that

> "Younger . . . rests upon the traditional reluctance of courts of equity. . . to interfere with a criminal prosecution. Strictly speaking, this element of Younger is not available to mandate federal restraint in civil cases." Huffman v. Pursue Ltd., 95 S. Ct. 1200, 1208 (1975).

The district court correctly decided that this case was not barred by Younger because the statutes in question are civil. The district court noted at 6a[5]

> "The challenged statutory scheme is designed to facilitate a creditor's collection of a judgment debt. The civil contempt proceedings are initiated by private parties to enforce compliance with subpoenas issued by private attorneys. They are not related to New York's Criminal statutes; nor do they plan any part in the enforcement of the state's criminal laws. Moreover, the challenged proceedings are defined as civil by the Judiciary law."

Because these proceedings are civil, federal restraint in this action is not warranted.

Appellants contend that civil contempt in New York should be viewed as a criminal proceeding because New York courts have characterized the proceedings as quasi-criminal. Appellants cite two lower New York court opinions to support their theory.[6] A closer examination of New York Court of Appeals cases indicates that New York courts have historically and consistently viewed civil contempt proceedings as civil proceedings and have distinguished them very clearly from criminal contempt. In People v. Oyer, 101 N.Y. 245, 247 (1886), the New York Court of Appeals noted that the distinction between civil and criminal contempt is "exhaustive and clear". While civil contempt involves the "vindication of private rights", criminal contempt involves:

> ". . . a violation of the rights of the public as represented by their constituted legal tribunals and a punishment; for the wrong in the interest of public justice, and not in the interest of an individual litigant." People v. Oyer, 101 N.Y. 245, 248 (1886)

See also King v. Barnes, 113 N.Y. 476 (1889).

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5 Page numbers followed by the letter 'a' refer to the appendix in appellant's Jurisdictional Statement.

6 A reading of Matter of Carlson v. Podeyn, 12 A.D. 2d 810, 209 N.Y.S. 2d 852 (2d Dept. 1961) reveals that the case does not characterize civil contempt proceedings as criminal. The court simply notes at 810-811

> "As punishment for contempt may involve not only loss of property but of liberty as well, it is a reasonable requirement that the mandate alleged to be violated should be clearly expressed, and when applied to the act complained of, it should appear with reasonable certainty that it had been violated."

The appellants also contend that the civil contempt proceedings are ". . . akin to a criminal prosecution for purposes of Huffman . . ." because the offender can be fined or jailed. However, this court has recently clearly stated that the possibility of incarceration does not convert a civil proceeding into one that is criminal. In Middendorf v. Henry, ____ U.S. ____, 44 L.W. 4401, 4405 (Mar. 23, 1976), this court noted

> ". . .the fact that a proceeding will result in loss of liberty does not ipso facto mean that the proceeding is a 'criminal prosecution' for purposes of the Sixth Amendment. Nor does the fact that confinement will be imposed in the first instance as a result of that proceeding make it a 'criminal prosecution'."

The possibility of incarceration was also not the major factor viewed by this court in Huffman, supra, in the application of the Younger doctrine in that case. This court decided that the proceeding was more "akin to a criminal prosecution than are most civil cases because

> "The state is a party to the Court of Common Pleas proceeding, and the proceeding is both in aid of and closely related to criminal statutes which prohibit the dissemination of obscene materials. Thus, an offense to the state's interest in the nuisance litigation is likely to be every bit as great as it would be were this a criminal proceeding." Huffman supra at 1208.

In Huffman, supra, a sheriff and a prosecuting attorney instituted a nuisance proceeding pursuant to the Ohio public nuisance statute in an effort to close a movie theatre specializing in pornographic

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6 (cont.) While the court in Dwyer v. Town of Oyster Bay, 28 Misc. 2d 952, 217 N.Y.S. 2d 392 (Sup. Ct., Nassau Co. 1961) characterizes contempt of court as a "semi-criminal proceeding", the court in that case appears to be dealing with a criminal contempt proceeding rather than a civil contempt proceeding.

films. The determination of obscenity in the proceeding was based upon the definition of obscenity contained in Ohio criminal statutes. In the instant case, private parties initiated civil contempt proceedings to enforce compliance with subpoenas issued by private parties. The state clearly does not institute the proceedings and is not a party to the proceedings. The civil contempt procedures are not utilized by the state to regulate behavior that is also regulated by criminal statutes.

Appellants argue that abstention is warranted even if the proceedings are viewed as civil and cite Schmidt v. Lessard, 421 U.S. 957 (1975) in support of their contention. In that case a three judge court issued an injunction against mental commitment proceedings which the court characterized as an aspect of the police power of the state. The district court noted at 349 F. Supp. 1078, 1084 (E.D. Wis. 1972),

> "Additionally, it is said that the individual may be deprived of liberty under the police power because of society's need to protect itself against the potential dangerous acts of persons who, because of mental illness, are likely to act irrationally."

Appellees contend that in Schmidt, supra this court did not extend Younger to all civil proceedings. This court simply remanded the case to the three judge court "...for further consideration in light of Huffman...". This court did not reverse in light of Huffman. Appellees further maintain that Schmidt, supra is distinguishable from the instant case because while civil commitment procedures may be an aspect of the state's police power and the need to regulate conduct, civil contempt procedures are in no way an aspect of police power. Because New York civil contempt proceedings are civil, injunctive relief was proper.

C. Because the Procedural Deficiencies in the Civil Contempt Statutes Prevent Individuals From Having an Adequate Opportunity to Raise the Federal Issues in State Court, Huffman v. Pursue Ltd., supra, Does Not Mandate Abstention.

In Younger v. Harris, 401 U.S. 37, 47 (1971) this court stated that injunctions against criminal prosecutions may be proper if the threat to the individual's federally protected rights "...cannot be eliminated by his defense against a single criminal prosecution." In Huffman, supra, this principle was reiterated.

The three judge court correctly decided that the procedural infirmaties in the civil contempt statutes prevented appellees from having an adequate opportunity to raise the federal issues in state court. Because the civil contempt statutes permit incarceration without a prior hearing, most appellees were incarcerated and deprived of their federally protected rights before they could raise the federal issues in state court. The three judge court properly relied upon this court's decision in Gerstein v. Pugh, 420 U.S. 103 (1975) in finding that an injunction directed against procedural deficiencies that prevent individuals from asserting their claims in state court is proper.[7]

D. Younger v. Harris Permits Injunctive Relief In This Case Because There is a Threat of Irreparable Injury From the Enforcement of Patently and Flagrantly Unconstitutional Statutes

In Younger v. Harris, 401 U.S. 37, 56 (1971), this court noted that a federal court may intervene in state court proceedings "...when there is a threat of irreparable injury both great and immediate. A threat of this nature might be shown if the

[7] The issue before the court was not as appellants contend whether individuals must obey court orders as in Walker v. City of Birmingham, 388 U.S. 307 (1967) and Maness v. Meyers, 419 U.S. 449 (1975) but rather whether the manner in which New York State authorizes enforcement of its judgments through the civil contempt procedures complies with the due process and equal protection clauses of the 14th Amendment to the U.S. Constitution.

state criminal statute in question were patently and flagrantly unconstitutional on its fact. . ." Huffman reiterated the language in Younger in stating that intervention is permitted where the challenged statute is:

> "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." Huffman v. Pursue Ltd., 955 S. Ct. 1200, 1212 (1975).

As evidenced by the discussion infra, New York civil contempt statutes meet the above mentioned test of flagrant unconstitutionality. Other three judge courts in other districts have found similar statutes to be patently unconstitutional. See Desmond v. Hachey, 315 F. Supp. 328 (D. Maine S.D. 1970), Abbitt v. Bernier, 387 F. Supp. 57 (D. Conn.1974).

E. Abstention is Not Warranted in Dealing With Unambiguous State Statutes That Have Been Interpreted by State Courts in a Consistent Fashion Since Their Enactment in 1909.

The abstention doctrine is not to be utilized when ". . . no reasonable interpretation. . . would award or modify the federal constitutional question. . ." Procunier v. Martinez, 94 S. Ct. 1800, 07, (1974). The three judge court correctly decided that abstention is not warranted when the state statutes in question are clear, enacted in 1909, and when appellants have not disputed the way in which the statutes operate. See Harmon v. Forssenius, 380 U.S. 528, 534 (1965); Bugget v. Bullit, 377 U.S. 360 (1964); Wisconsin v. Constontineau, 400 U.S. 433, 439 (1971); Lindsey v. Normet, 405 U.S. 56, 62 (1972).

The present case is distinguishable from Carey v. Sugar, ___ U.S. ____, 44 L.W. 4416 (Mar. 23, 1976) in that the civil contempt statutes are not subject to a saving construction. The

statutes have been consistently interpreted to permit adjudication of contempt and incarceration without a hearing, Stewart v. Smith, 186 App. Div. 755, 175 N.Y.S. 468 (1919); Russell Homes Corp. v. Lynch, 17 N.Y.S. 2d 428, reversed on other grounds 20 N.Y.S. 2d 787 (1940); and to provide for inadequate notice or warning of the consequences of a failure to appear at the show cause hearing. The statutes further provide for no right to counsel and permit the imposition of punitive fines. Clark v. Biniger, 75 N.Y. 344 (1878); Geller v. Flamount Realty Corp., 260 N.Y. 346 (1932); Joseph Reidel Glassworks, Inc. v. Kurtz Inc., 287 N.Y. 636 (1941); Lavine v. 97 Realty Corp., 21 A.D. 2d 655 (1st Dept. 1964). The appellants set forth no cases which indicate that the statutes have been interpreted otherwise. Therefore, abstention was not warranted.

II. THE THREE JUDGE COURT CORRECTLY DECIDED THAT ON FOUR GROUNDS THE JUDICIARY LAW SECTIONS 756, 757, 770, 772, 773, 774, AND 775 WERE UNCONSTITUTIONAL.

A. Judiciary Law Sections 756, 757, 770, 773, and 774 Permit An Adjudication of Contempt and Order of Imprisonment Without an Actual Hearing.

The three judge court found Sections 756, 757, 770, 773, and 774 violative of the due process clause of the Fourteenth Amendment because they authorize incarceration ". . . on the basis of a creditor's affidavit of service and an ex parte proceeding." (7a) The court held that "A finding of contempt can be properly made only upon a hearing with both parties present. The defect is not cured by providing a hearing within 90 days of incarceration." (7a-8a).

Appellants' argue that an individual may be incarcerated without appearing before a court. However, appellants' reliance upon Endicott Johnson Corp. v. Encyclopedia Press, Inc. 266 U.S.

285 (1924) and Blackmer v. United States, 284 U.S. 421 (1932) is misplaced.[8] Because the New York civil contempt statutes involve the fine and imprisonment of individuals for their failure to respond to subpoenas, the due process standards set forth in Endicott, supra, and Blackmer, supra, are inapplicable to this case. Endicott, involved the garnishment of a debtor's wages, his property, in satisfaction of the judgment. Blackmer, supra involved the fining of an individual after a hearing for noncompliance with a subpoena. Since it is elemental that the requirements of due process depend upon the potential loss an individual may be subjected to, more elaborate due process protections are required when an individual may be subjected to incarceration than when an individual is subject to a fine or taking of property. As stated in Cafeteria & Restaurant Workers Union Etc., v. McCloy, 367 U.S. 886, 895 (1961):

> "Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."

A hearing is clearly required before an individual may be incarcerated.

The district court properly relied upon Harris v. United States, 382 U.S. 162, 167 (1965) in analyzing the type of due process required before an individual may be subjected to incarceration. The court noted at 167 that "...a hearing and only a hearing will elicidate all the facts and assure a fair

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8 Appellants' reference to Blouin v. Dembitz, 484 F. 2d 488 (2d Cir. 1974) is also of questionable relevance. Blouin, supra dealt with the adequacy of the service of process in New York Family Court proceedings and did not deal with the propriety of incarceration without a hearing.

administration of justice." In McNeil v. Director, Patuxent Institution, 407 U.S. 245, 251 (1972) this court rejected the contention that an individual might be incarcerated by forfeiting an opportunity for hearing. The court stated:

> "For if confinement is to rest on a theory of civil contempt, then due process requires a hearing to determine whether petitioner has in fact behaved in a manner that amounts to contempt."

The district court also properly relied upon Desmond v. Hackey,[9] 315 F. Supp. 328 (D. Me. 1970) and In Re. Harris, 69 Cal. 2d 486, 446 P. 2d 148 (1968) in support of the decision that a hearing must occur before and not after incarceration.

B. Judiciary Law, Section 757 does not provide for adequate notice in warning of the consequences of failure to appear at the show cause hearing.

The three judge court found Judiciary Law Section 757 violative of the due process clause of the Fourteenth Amendment because the statute fails to require that the order to show cause inform individuals that failure to appear at the show cause hearing might result in imprisonment. The court held that:

> "...notice must be complete and clear, given the substantial deprivation of

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9 In Desmond, supra a three judge district court declared the Maine civil contempt statutes unconstitutional. Caplovitz, in his empirical study of debt collection practice, has noted similarities between the New York Procedure and the former law in Maine:

> "The tactic of the supplementary proceeding allows for the resurrection in the latter third of the twentieth century of that seemingly outmoded institution, debtor's prison. It is not known whether any debtor in our sample went to jail because of his failure to appear at a supplementary proceeding, but this contempt of court weapon was widely used against debtors in Maine, and an upstate New York Supreme Court judge has told us in a private communication that such sentences had occurred in his area." 2D. Caplovitz, Debtors In Default 12-2 (1971).

> of liberty that may result from failure to respond. Fundamental fairness requires that the show cause order contain a clear statement of the purpose of the hearing and a stark warning that failure to appear may result in contempt of court and imprisonment." (8a)

Appellees maintain that the district court correctly determined that clear notice is required before one can be subjected to incarceration. It is elemental that the requirements of due process depend upon the kind of deprivation that could result from a failure to respond. As stated in Mullane v. Central Hanover Bank & Trust Co., 399 U.S. 306, 313 (1950),

> "The Due Process Clause requires that deprivation of life, liberty or property... be preceded by notice and opportunity for hearing appropriate to the nature of the case."

Appellants' contention that only a person under a disability is entitled to the kind of notice required by the district court is without authority. Covey v. Town of Somers, 351 U.S. 141 (1956) cited by appellants merely indicates that an incompetent is entitled to more notice than was required by Article VII A, Title 3, of the New York Tax Law. Covey, supra says nothing about the requirements of due process regarding competent individuals faced with incarceration.

Moreover, appellants' assertion that the district court improperly relied upon Lynch v. Baxley, 386 F. Supp. 378, 388 (M.D. Ala. 1974) is in error. The court in Lynch, supra held that notice of commitment hearings must include in part "...the date, time, and place of the hearing; a clear statement of the purpose of the proceedings and the possible consequences to the subject thereof..." These procedures were required in Lynch, supra, because they are elemental aspects of procedural due process.

Likewise, notice of the consequences of nonappearance at a show cause hearing is a basic requirement of procedural due process.

C. Sections 756, 770, 772, and 774 subject the debtor to imprisonment without informing him of his right to counsel and to assigned counsel if indigent.

The three judge court found Judiciary Law Sections 756, 770, 772, and 774 violative of the due process clause of the Fourteenth Amendment because the statutes authorize incarceration without providing a right to counsel and assigned counsel if indigent. The district court found:

> "Moreover, the right to a hearing prior to imprisonment is ineffective without counsel. The debtor cannot be expected to understand, much less to present, the legal and factual defenses to a finding of contempt that might be raised. Surely, a debtor who is deprived of his liberty is as much entitled to due process as is a defendant charged with a crime." (8a)

The right to counsel is essential when an individual is threatened with incarceration and when an individual must defend him or herself against this loss of freedom in an adjudication of factual and legal issues.

It is clear that at no stage of New York civil contempt procedures is an individual informed of the right to the assistance of counsel and that counsel would be provided at public expense if indigent.

Despite appellants' assertion that persons faced with civil contempt for failure to pay support are to be advised of their right to counsel, a closer examination of the case cited by appellants, Rudd v. Rudd, 45 A.D. 2d 22 (4th Dept. 1974), reveals that the case does not deal with the civil contempt

procedures in Article 19 of the Judiciary Law. The case does deal with New York Family Court Act Sections 433, 454, and procedures utilized to enforce compliance with Family Court support orders. Pursuant to this Act, an individual must be advised of the right to counsel prior to a finding of contempt. Rudd, supra, simply held that assigned counsel must be provided in the Family Court proceedings. This construction of the statutes is confirmed by the legislature's express provision for advising individuals of their right to counsel and providing assigned counsel for indigents[10] in the analogous non-support situation in Family Court.[11] This construction is also confirmed by appellant Grandy's specific denial of assigned counsel to appellee Rabasco in a contempt proceeding involving alleged disobedience of a support order in Dutchess County Supreme Court.

Appellees maintain that their due process right to a meaningful opportunity to present a defense before incarceration includes the right to be represented by counsel and assigned counsel if indigent in this proceeding that might result in incarceration.

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10 See People ex rel. Amendola v. Jackson, 74 Misc. 2d 797, 346 N.Y.S. 2d 353, 359-60 (1973); G v. G., 74 Misc. 2d 516, 345 N.Y.S. 2d 361, 367 (1973).

11 New York Family Court Act, Article 4 Support Proceedings Section 433 Hearing

> Upon the return of the summons or when a respondent is brought before the court pursuant to a warrant, the court shall proceed to hear and determine the case. The respondent shall be informed of the contents of the petition, advised of his right to counsel, and shall be given opportunity to be heard and to present witnesses. . ." (emphasis added)

In Argersinger v. Hamlin, 407 U.S. 25, 37 (1972), this court adopted the rule that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." (emphasis added). In a concurring opinion, Chief Justice Burger stated at 40:

> ". . .cogent factors suggest the infirmities in any approach that allows confinement for any period without the aid of counsel at trial; any deprivation of liberty is a serious matter."

While Argersinger dealt with an individual's right to the assistance of counsel in criminal prosecutions, this court has recognized the right to counsel in non-criminal cases where there is the possibility of incarceration and a deprivation of personal liberty. The Supreme Court has repeatedly found a right to the assistance of counsel when an individual's freedom is in jeopardy and has rejected the civil/criminal distinction in determining when this right attaches. See Specht v. Patterson, 386 U.S. 605 (1967) (right to counsel in commitment proceedings in Sex Offenders Act); Gagnon v. Scarpelli, 93 S. Ct. 1756 (1973) (right to counsel in certain circumstances in probation revocation hearings).

Many state courts have also recognized that the right to counsel extends to civil proceedings where individual liberty and other fundamental rights are placed in jeopardy. State courts have found a right to counsel in cases involving civil commitment for mental disability,[12] civil commitment as a drug addict, [13]

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12 State v. Collman 497 P. 2d 1233 (Or. App. 1972); In re Popp, 62 Ohio 2d 54 (1972).

13 Thompson v. Morrow, 57 Misc. 2d 932, 293 N.Y.S. 2d 974 (Sup. Ct. Sullivan Co., 1968).

involuntary termination of parental rights,[14] and contempt proceedings regarding alleged violations of support orders[15]. As stated in Otton v. Zaborac, 525 P. 2d 737, 39-40 (Alaska Sup. Ct. 1974):

> "The potential deprivation of liberty in non-support contempt proceedings is as serious a matter as the restraint of liberty possible in criminal, juvenile, and criminal contempt proceedings. Therefore, we hold that in the case before us due process of law requires the assistance of counsel. . .And of course, this right to counsel would be of little avail if it were not afforded to those defendants unable to pay a private attorney."

Regarding civil contempt proceedings, the Supreme Court in Cooke v. U.S., 267 U.S. 517 (1925) stated: "Due process of law, therefore, in the prosecution of contempt, except that committed in open court. . . includes the assistance of counsel". See In re Oliver, 333 U.S. 257, 275 (1948); Sodones v. Sodones, 314 N.E. 2d 906, 910 (Mass. Sup. Jud. Ct. (1974).

Shortly after Argersinger, the court in United States v. Sun Kung Kang, 468 F. 2d 1368, 1369 (9th Cir. 1972), dealt specifically with the right to counsel question in civil contempt proceedings[16] and decided that due process encompassed such a right.

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14 Crist v. New Jersey Division of Youth and Family Services, 320 A. 2d 203 (Sup. Ct. N.J. 1972); Matter of Ella B., 30 N.Y. 2d 352, 334 N.Y.S. 2d 133 (1972); Chambers v. District Court of Dubuque County, 152 N.W. 2d 818 (Sup. Ct. Iowa 1967); State v. Jamison, 251 Ore. 114, 444 P. 2d 15 (Sup. Ct. Or. 1968).

15 Rudd v. Rudd, 45 A.D. 2d 22 (4th Dept. 1974); Commonwealth v. Hendrick, 283 A. 2d 722 (Pa. Super. 1971); Houle and Dubose, The Nonsupport Contempt Hearing: Constitutional & Statutory Requirements 19 N.H.B.J. 165, 171-172 (1973).

16 See U.S. v. Handler, 476 F. 2d 709 (2nd Cir. 1973).

> "We have concluded that an indigent witness is entitled to appointed counsel in (a civil contempt) proceeding. Threat of imprisonment is the coercion that makes a civil contempt proceeding effective. The civil label does not obscure its penal nature."

In striking down California's mesne civil arrest procedures, in In re Harris, 69 Cal. 2d 486, 446 P. 2d 148. (Calif. Sup. Ct. 1968), Chief Justice Traynor noted the importance of the right to counsel in civil contempt proceedings.

> "An individual who is deprived of liberty by civil process is as much entitled to due process of law as a defendant who is deprived of his liberty because he is charged with crime. The mesne process of civil arrest without opportunity to be heard with the assistance of counsel is not due process." Harris at 152.

Traynor also noted the importance of providing assigned counsel to indigents.

> "The civil defendant cannot be expected to understand and to present the legal obligations that may be raised in testing the validity of the arrest order. . . An indigent defendant imprisoned under the process of mesne and arrest is confined in the same jail as the indigent felon undergoing trial who is entitled to appointed counsel under Gideon and the indigent misdemeanant who is serving a sentence imposed only after a trial at which he was entitled to appointed counsel under California's constitutional standards." Harris at 151-52.

In Tetro v. Tetro, 544 P. 2d 17 (Sup. Ct. Wash. 1975), the Supreme Court of Washington held that individuals have a right to assigned counsel in civil contempt cases and stated at 19:

> "We thus join the great majority of courts which have addressed the issue and hold that, wherever a contempt adjudication may result in incarceration, the person accused of contempt must be provided with state-paid counsel if he or she is unable to afford private representation."

In Abbitt v. Bernier, 387 F. Supp. 57 (D. Conn. 1974) a three judge court in Connecticut found Connecticut's body execution statute unconstitutional. In discussing the type of legislation that would meet constitutional norms, the Court stated at 63 that "Appointed counsel. . . would likely be the right of every judgment debtor threatened with body execution." New York civil contempt procedures violate constitutional norms guaranteed by the due process clause of the Fifth and Fourteenth Amendments by subjecting individuals to the threat of incarceration without informing them of their right to counsel and assigned counsel if indigent.

The appellees' failure to appear at the show cause hearing does not constitute a waiver of their right to counsel and a foreclosure of their defense of indigency. The Supreme Court in Johnson v. Zerbst, 304 U.S. 458, 464, (1938) noted:

> "It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights."

The Court in Johnson then set forth the basic rule that the waiver of the right to counsel must be "an intentional relinquishment or abandonment of a known right or privilege". At no stage in the New York Judiciary Law Article 19 civil contempt proceedings were appellees advised of their right to counsel. Appellees did not intentionally relinquish their right to counsel because they were never informed that this right existed. Appellee Rabasco was specifically informed that the right to assigned counsel did not exist.

A waiver of the right to counsel cannot be presumed from the fact that appellees did not request to be furnished counsel. In Carnley v. Cochran, 369 U.S. 506, 515 (1962), the Supreme Court noted, ". . .where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request".

It is clear that the waiver principles of Johnson and Carnley apply to civil proceedings such as civil contempt. The Supreme Court stated in Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 307 (1937), a civil proceeding involving a rate increase, that "We do not presume acquiescence in the loss of fundamental rights".

In this case, we cannot presume that appellees' acquiesed in the loss of their fundamental right to representation by counsel.

D. The Fines and Incarceration Permitted Under Judiciary Law Sections 756, 770, 773, and 774 Are Punitive.

The three judge court correctly decided that

> ". . . the sanctions imposed under the challenged statutes are neither remedial nor coercive, but punitive. Where compensation is intended and a fine imposed, it must be based on evidence of the complainant's actual loss. Section 773 requires the imposition of a fine up to $250 plus costs when the alleged contempt has not been shown to have resulted in any loss or injury to the creditor. If coercion is the purpose of the sanction, it can be justified only if the person has the ability to comply. The absence of the procedural safeguards of indictment and jury trial can be justified only by the conditional nature of the imprisonment and the contemnor's continued defiance. Section 756 permits the arrest and incarceration of a debtor, whether or not he is able to comply with the order by paying the fine. To the extent, therefore, that the fines and imprisonment contained in the Judiciary Law are punitive, they cannot be imposed in a civil contempt proceeding."

Judiciary Law Sections 756, 770, 773, and 774[17] violate the due process clause of the Fourteenth Amendment by authorizing the imposition of fines without proof of actual loss or injury on indigent debtors who have no ability to pay the fine.

The only allowable purposes for imposing a fine in a civil contempt proceeding are (1) to compensate the party injured by the contumacious conduct and (2) to coerce compliance with the court's mandate. Gompers v. Buck's Stove & Range Company, 221 U.S. 418 (1911); Shillitani v. United States, 382 U.S. 364 (1966). If the fine is neither compensatory nor coercive, then it is punitive and the imposition of such a fine is not permitted in a civil contempt proceeding. Sunbeam Corp. v. Golden Rule Appliance Co., 252 F. 2d 467 (2d Cir. 1958). Judiciary Law Section 773 authorizes the imposition of a punitive fine without proof of loss.

Judiciary Law Section 773 clearly provides that a fine of up to $250 in addition to costs, expenses and reasonable attorneys fees[18] shall be imposed without proof of actual loss.[19] Appellants' contention that the $250 maximum is not disproportionate to the contempt is irrelevant in due process terms. The fine must be previsely proportionate to the loss.

In Sunbeam Corp., supra, at 470 the Second Circuit clearly stated that awards in civil contempt cases are limited to

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17 While appellants contend that only Section 773 is involved in this issue, a closer examination of the statutes indicates that Sections 756, 770, and 774 all authorize use of the fining provision.

18 Benson Realty Corp. v. Walsh, 73 Misc. 2d 889, 343 N.Y.S. 2d 55 (Sup. Ct. New York Co. 1973).

19 In the case of appellee Ward, he was fined $250 plus $20 for costs and expenses even though the actions taken against Ward arose out of a judgment in the amount of $146.84.

compensatory amounts. "For its effect goes no further than to give to the plaintiff the profits derived by the defendant's wrongful conduct; it does not take from the defendant assets not related to its wrongful conduct." The court noted in National Drying Machinery Co. v. Ackoff, 245 F. 2d 192, 194 (3rd Cir. 1957), cert. den. 355 U.S. 832 (1957), "Whether an award in civil contempt be measured in terms of a plaintiff's loss or a defendant's profit, such an award, by very definition, must be an attempt to compensate plaintiff for the amount he is out-of-pocket or for what defendant by his wrong may be said to have diverted from the plaintiff or gained at plaintiff's expense."

The amount of the fine must be determined by considering allegations or proof of actual damage incurred as a result of the contumacious conduct. In Christensen Engineering Co. v. Westinghouse Air Brake Co., 135 F. 774, 782 (2nd Cir. 1905), the court noted that because the fine in a civil contempt proceeding is imposed to indemnify the aggrieved party,

> "it should not exceed his actual loss incurred by the violation of the injunction, . . . it should not exceed in amount the loss and expenses established by the evidence before the court. Unless it is based upon evidence showing the amount of the loss and expenses, the amount must necessarily be arrived at by conjecture and in this sense it would be merely an arbitrary decision."

In United States v. United Mine Workers of America, 330 U.S. 258, 304 (1947) the court noted that a civil contempt fine "must of course be based upon evidence of complainant's actual loss." In Babee-Tenda Corp. v. Sharco Manufacturing Co., 156 F. Supp. 582, 588 (S.D.N.Y. 1957), the court stated that in civil contempt proceedings the "claim of actual damages must be established by competent evidence and the amount must not be arrived at by mere speculation or conjecture". New York Judiciary Law Section 773 violates the

due process clause of the Fourteenth Amendment by authorizing the imposition of a fine without regard to the creditor's actual loss.

Sections 756, 770, 773, and 774 also violate the due process clause because the fines are punitive rather than coercive. Pursuant to the cited sections, appellees were imprisoned until they performed the required act and paid the fine.[20] They could not end their sentence or the fine even if they did what they had previously refused to do, i.e., respond to the subpoena duces tecum. All appellees were incarcerated because they were unable to pay the contempt fines.[21] New York civil contempt procedures do not require a finding of ability to comply with the contempt order prior to incarceration.[22]

Civil contempt may not be used as a punitive measure. Incarceration is improper unless the court finds that the contemnor can comply with the court order. As the court stated in Gompers, supra at 442, civil contempt is "intended to be remedial by coercing the defendant to do what he had refused to do. . . He can end the sentence and discharge himself at any moment by doing what he had previously refused to do". In In Re Nevitt, 117 F.

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20 The fact that the Orders of Contempt issued by appellants Aldrich and Juidice do not require compliance with the subpoenas, but only payment of the fine, makes clear the degree to which this entire process is simply a collection mechanism employed against judgment-proof debtors.

21 It is significant to note that most of the plaintiffs who were incarcerated for their inability to pay the contempt fines were recipients of public assistance or unemployment insurance benefits. New York Social Welfare Law Sections 137 and 137a specifically exempt the public assistance grant and wages of a recipient of public assistance from levy, execution, income execution or installment payment order. New York Labor Law Article 18 Unemployment Insurance Section 595 states that "Benefits. . . shall be exempt from all claims of creditors and from levy, execution and attachment, or other remedy for receiving or collection of a debt. This exemption may not be waived."

22 This interpretation is confirmed by 6 Weinstein-Korn-Miller, New York Civil Practice §5251.02 cited by appellants. That treatise notes at 52-747 that the effect of Section 773 is as follows: "In effect, the judgment was converted into an order for payment without proof of the debtor's ability to pay."

448 (8th Cir. 1902) the court stated at 461 "but they are not remediless. They are imprisoned only until they comply with the orders of the court, and this they may do at any time. They carry the keys of their prison in their own pockets."[23] In United States v. United Mine Workers of America, 330 U.S. 258, 304 (1947) it is stated that:

> "a court which has returned a conviction for contempt must, in fixing the amount of a fine to be imposed as a punishment or as a means of securing future compliance, consider the amount of defendant's financial resources and the consequent seriousness of the burden to that particular defendant."

In California the court must make a finding that the individual is able to comply with the contempt order before committing the individual. In Noortnoek v. Superior Court, 269 Cal. App. 2d 600, 609, 75 Cal. Rptr. 61, 67 (1969), the court stated:

> "In order to support an indefinite commitment...there must be a finding, based upon evidence, that the contemnor has the present ability...proof that (contemnor) had the ability to pay reasonable support, month by month, is not proof that (he) is now able to pay a lump sum of 4,000."

In Yoder v. County of Cumberland, 278 A 2d 379, 390 (Me. Sup. Ct. 1971) the Maine Supreme Court held that the summary incarceration of a debtor without a hearing violated the due process clause. The court noted, "Of course contempt by its very nature is inapplicable to one who is powerless to comply with the court order. It would be utilized against only that person who, being able to comply, contumaciously disobeys, or refuses to abide by, the court order."

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23 Inability to comply is a complete defense to a civil contempt order U.S. v. Thompson 319 F. 2d 665, 770-771 (2nd Cir. 1963).

The Supreme Court also has noted that it is absolutely improper to use the civil contempt process to force an individual to satisfy the contempt order by borrowing money from others. In Maggio v. Zeitz, 333 U.S. 56, 64 (1948) the court stated:

> No such acts, however reprehensible, warrant issuance of an order which creates a duty impossible of performance, so that punishment can follow. It should not be necessary to say that it would be a flagrant abuse of process to issue such an order to exert pressure on friends and relatives to ransom the accused party from being jailed.

See also United States v. Bryan, 339 U.S. 323 (1950).

In this case appellees have been deprived of the opportunity to demonstrate, before summary arrest, that compliance with the court order to pay default judgments and fines is impossible, i.e., that they are without funds to pay, and therefore that each arrest order "is an unqualified commitment to jail...and provides no way by which (they) may unlock the door of (their)prison by doing the thing which (they have) been ordered to do." Duell v. Duell, 85 App. D.C. 78, 178 F. 2d 683, 14 A 2d 560, 565 (1949). Appellants' contention that appellees never sought to excuse their failure to pay the fine or claim they were unable to pay the fine is spurious. The statutory scheme provides no opportunity for an individual to raise inability to comply with a contempt order as a defense to incarceration. Appellants' reliance upon National Coal Operators, Association v. Kleppe, ____ U.S. ____, 46 L. Ed. 2d 580 (1976) is also misplaced. In this case, unlike National, supra, the statutes provide no opportunity for a hearing after the contempt order and fine is imposed.

Judiciary Law Sections 756, 770, 773, and 774 violate the due process clause of the Fourteenth Amendment by imposing punitive fines on individuals who have no ability to pay these fines.

III. CLASS ACTION RELIEF WAS PROPER

The district court granted class action relief pursuant to Rule 23 of the Federal Rules of Civil Procedure because appellees satisfied all requirements of that rule. While appellants contend that class action relief was not proper, they fail to point to one section of Rule 23 that appellees did not meet.

Appellants contention that the class action relief was responsible for local sheriffs' decisions not to execute contempt fine orders in matrimonial non-support cases is simply not accurate. The effect of the three judge court order was to prevent the use of incarceration for nonpayment of support and alimony orders as well as for nonpayment of contempt orders by judgment debtors. The order had that effect not because of the class action relief but because incarceration for nonpayment of support and alimony orders in New York Domestic Relations Law and the New York Family Court Act is authorized by the Judiciary Law. When the statutes authorizing incarceration in the Judiciary Law were declared unconstitutional, there was no basis for use of incarceration in the support and alimony areas. New York Civil Rights Law Section 23 forbids civil arrest except as provided by statute.

IV. THE DISTRICT COURT PROPERLY GRANTED PARTIAL SUMMARY JUDGMENT TO APPELLEES

Appellants maintain that the three judge court improperly granted partial summary judgment to appellees.

Appellees maintain that both the grant of partial summary judgment and the procedures utilized by the three judge court in making the decision were proper.

The summary judgment procedure described in the Federal Rules of Civil Procedure Rule 56 "...is a procedural device for promptly disposing of actions in which there is no genuine issue as to any material fact. 6 Moore's Federal Practice Section 56.01(3) at 56-15 (1975). Justice Cardozo noted that:

> "The very object of a motion for summary judgment is to separate what is formal or pretended in denial or averment from what is genuine and substantial, so that only the latter may subject a suitor to the burden of a trial. "Richard v. Credit Suisse, 242 N.Y. 346, 152 N.E. 110 (1926)."

The three judge court granted partial summary judgment because there were no geniune issues as to any material fact. Appellants appear to concede at page 17 of their Jurisdictional Statement that at least some of the appellees were indigent. The amount of fines could not be an issue of material fact as they are prescribed by Judiciary Law Section 773. Appellants fail to set forth any other material facts which might be in issue.

Appellants also contend that the court erred in granting summary judgment sua sponte. Appellees maintain that there is clear authority for such action. In Briscoe v. Campagnie Nationale Air France, 290 F. Supp. 863, 867 (S.D.N.Y. 1968), the court noted:

> "No motion has been made by Air France for summary judgment but it is evident that such a judgment should be entered and the court has authority to direct entry of such judgment even though there is no motion. 6 Moore's Federal Practice (2d ed.) 2241-46.

In Sibley Memorial Hospital v. Wilson, 488 F. 2d 1338, 1343-44 (D.C.C. 1973), the court stated, "Trial judges are not, of course, without the power to enter summary judgment sua sponte." See also White v. Flemming, 374 F. Supp. 267 (E.D. Wis. 1974); Federal Deposit Insurance Corporation v. Sumner Financial Corporation, 376 F. Supp. 772 (M.D.Fl. 1974).

V. THE DISTRICT COURT PROPERLY ENJOINED THE OPERATION OF THE STATUTES IN QUESTION AGAINST "ALL PERSONS WHO HAVE BEEN OR ARE PRESENTLY SUBJECT TO CIVIL CONTEMPT PROCEEDINGS

The district court correctly determined that the injunction should apply to "all persons who have been or are presently subject to civil contempt proceedings". It is clear that in civil and criminal cases[24] retroactivity of decisions must be based upon the following factors: (1) purpose to be served by the new standards, (2) the extent of the reliance by public officials on the old standards, and (3) effect on the administration of justice of a retroactive application of the new standards. Daniel v. Louisiana, 420 U.S. 31 (1975).

Applying these factors, the purpose to be served by the new standards is insure the reliability of a fact-finding process that may result in the incarceration of individuals. This court has held that Gideon v. Wainwright, 372 U.S. 335 (1963) is retroactive because the presence of counsel is essential to safeguard the reliability of the fact-finding process. Burgett v. State of Texas, 389 U.S. 109, 114(1967); Kitchens v. Smith, 401 U.S. 847 (1971). Similarly, the three judge court's decision that the New York civil contempt procedures are

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24 The same general principles of retroactivity apply to civil and criminal litigation. Linkletter v. Walker, 381 U.S. 618 (1965).

unconstitutional in part because of the denial of the right to counsel mandates retroactive application of the decision.

While officials have relied upon the old standards, retroactive application will not have an undue burden on the administration of justice. Contempt orders obtained under the Judiciary Law will simply be unenforceable and new procedures that are consistent with elemental due process requirements will be required before contempt orders can be enforced. The administration of justice will be served by the district court order.

V. CONCLUSION

WHEREFORE, appellees respectfully submit that the questions upon which this cause depend are so unsubstantial as not to need further argument and that the three judge court's decision was correct. Appellees respectfully move the Court to affirm the judgment entered in the case by the Three Judge District Court for the Southern District of New York.

Respectfully submitted,

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April 27, 1976

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